UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SYRACUSE SCENERY & STAGE LIGHTING CO., INC.

Cases 3–CA–23798–1 & 2
3–RC–11249

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 9

Robert Ringler, Esq., for the General Counsel.
John T. McCann and Christian P. Jones, Esqs., (Hancock & Estabrook, LLP), of Syracuse, New York, for the Respondent.
Mairead E. Conner, Esq., (Chamberlain, D'Amanda, Oppenheimer & Greenfield), of Syracuse, New York, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Syracuse, New York on January 30-31, 2003. The charges were filed September 4 and 5, 2002 and the complaint was issued November 25, 2002. The General Counsel alleges that Respondent, Syracuse Scenery and Stage Lighting Company, Inc., violated Section 8(a)(3) and (1) of the Act in discharging four employees, Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga, on September 4, 2002 in order to retaliate against at least some of them for engaging in union organizing activity and to discourage all of its employees from engaging in such activities. Respondent contends that it discharged the four employees for legitimate nondiscriminatory reasons—leaving work early and then submitting inaccurate timesheets. The General Counsel also alleges that Respondent violated Section 8(a)(1) by posting no-solicitation signs at its facility on or about June 18, 2002.

A representation election was conducted at Respondent's facility on January 6, 2003, in the following collective bargaining unit:

> All regular full-time and regular part-time installation technicians, installation prep employees, rental/lighting technicians, curtain installation technicians, and shipping receiving clerks, employed by the Employer at its 101 Monarch Drive, Liverpool, New York facility.

Seven votes were cast against the Union; four were cast for the Union; the four employees who were discharged on September 4, 2002 cast ballots, which were challenged by the Respondent and not counted. Thus, if the Board finds that these employees were discriminatorily discharged, their ballots could be determinative of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, fabricates stage curtains, installs theatrical equipment and sells theatrical supplies at or from its facility in Liverpool, New York, outside of Syracuse. It annually sells and ships goods valued in excess of $50,0000 directly to points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 9 of the International Alliance of Theatrical Stage Employees (IATSE), is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The union organizing campaign

In the summer of 2002, Respondent employed about 33 individuals, including approximately fourteen installation technicians, or "riggers."[1] The riggers generally worked at school or community theaters installing counterweights and other apparatus for the suspension of scenery and stage curtains and hanging lights. Approximately ninety percent of Respondent's customers for its rigging services were public institutions. On these public projects, Respondent was required to pay the riggers a "prevailing wage rate." The prevailing wage consisted of a base wage and a fringe benefit component. This prevailing rate ranged anywhere from $25 per hour to $42 per hour, depending on the location of the worksite. The fringe benefit component, which ranged between $6 per hour and $14 per hour, could by statute either be paid to employees as part of their paycheck or placed in a retirement, insurance or other fringe benefit fund.

Prior to June 2002, Respondent paid its riggers the entire prevailing rate as part of their paychecks. On June 3, 2002, Respondent President, Christine Kaiser, announced to employees that Respondent was implementing a retirement fund (an Internal Revenue Service 401 pw account) into which the entire fringe portion of the riggers' pay would be deposited. The rigging employees later met with Ms. Kaiser and Respondent's Vice-President, Frank Willard. Rigger Jeff Bidwell protested on behalf of the rigging employees that the retirement plan would reduce their take home pay drastically. Kaiser said her decision regarding implementation of the retirement fund was irreversible.

At another meeting on June 10, with Frank Willard, Bidwell again complained about the decrease in the riggers' take home pay and asked that the implementation of the retirement plan be delayed. At some point in the meeting, Bidwell stated that the riggers' problem was that they didn't have a union. Willard asked which union they were interested in. Shortly thereafter, Bidwell and others, including John Szuszniak, started an organizing drive and solicited employees to sign IATSE authorization cards. Several employees, including all the discriminatees, attended at least two union meetings at Bidwell's home. Joseph Vitetta signed

[1] At least half of the employees were not members of the proposed bargaining unit, such as employees who sewed curtains at Respondent's shop.

an authorization card. Chris Kaiser and Frank Willard learned of the union organizing drive shortly thereafter. A bargaining unit employee provided them with information about the organizational campaign. Although Bidwell, Szuszniak and possibly some other of employees of Respondent already were members of IATSE, the Union was not their collective bargaining representative with Respondent.[2]

The Seneca Falls Project and events leading to the discharges

A four man rigging crew began work installing theatrical equipment at a school in Seneca Falls, New York on Monday, August 12, 2002. Employees were paid the prevailing rate for time spent on this project. Jeff Bidwell was the crew chief. He and crewmember John Szuszniak reported to Respondent's shop in Liverpool each morning and then drove 40-45 minutes to the Seneca Falls jobsite. Bidwell and Szuszniak returned to the shop each evening. The two other crewmembers, Michael Noga and Joseph Vitetta, drove directly to and from the jobsite from their residences.

On August 20, 2002, the Union filed a petition to represent Respondent's riggers, lighting technicians and shipping clerks. Respondent apparently received the petition the same day. On or about August 21, Frank Willard met with the entire rigging staff. At this meeting Willard told the rigging employees that their weekly timesheets had to be accurate.

On Monday, August 26, Joseph Varco, Respondent's project manager for the Seneca Falls site went to the school at about 2:00 p.m. He found that none of the crewmembers were at the site. He stayed at the jobsite until about 2:30, reported the crew's absence to Willard and then drove back to Respondent's shop in Liverpool. At about 3:45 p.m. Bidwell and Szuszniak arrived at the shop. Neither Varco nor Willard asked these employees why they were not at the jobsite during Varco's visit.[3]

Respondent contends that Varco went to Seneca Falls on August 26, the beginning of the crew's third week on that project, because the work was to have been completed within two weeks. Despite this contention, there is no evidence that Varco, Willard or any other member of management asked Bidwell or any other crewmember why the job was taking them so long. Varco testified that the Seneca Falls job was not the only project that took longer to complete than anticipated. There is no evidence that Respondent sent management employees to spy on work crews on any other job whose duration exceeded expectations. I therefore infer that Respondent's principal, and possibly only, motive for sending Varco out to the jobsite was to establish a basis for terminating Bidwell and the other members of his crew, all of whom had at least attended union organizational meetings.

Varco returned to the site with another project superintendent, Harold "Ike" Shippers at about 2:00 p.m. on Tuesday, August 27. As Varco and Shippers entered the school grounds they encountered crewmembers Noga and Vitetta, in separate vehicles, leaving the site. Varco and Shippers drove behind the school to the theatre area where they found Bidwell sitting in his company van, talking on a cell phone and Szuszniak packing up the crew's materials. Shippers called Frank Willard and informed him of these facts.

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[2] Prior to the summer of 2002, the Union hiring hall had referred a number of its members to Respondent, including Bidwell and Szuszniak. Up until June 2002, Joseph Varco, one of Respondent's project managers, was president of Local 9.

[3] No such inquiry was made later in the week, either.

Varco and Shippers went to the stage area where they were first joined by Bidwell and Szuszniak, and then by Noga and Vitetta, who turned around and came back to the worksite. At no time did Varco or Shippers indicate to the crew that they were unhappy with the progress of the job. Both made notes of their visit, which dealt exclusively with checking on the times at which the crew left the jobsite.[4] Varco and Shippers left the site at about 2:30 and hid for about a half hour. They returned at about 3:00 p.m. and found none of the crewmembers at the site. They stayed at the site for about 15 minutes. On the way back to Liverpool, Varco and Shippers had to repair a flat tire. When they arrived at the shop, Bidwell and Szuszniak were already there. Neither Varco nor Shippers asked where the two crewmembers were between 3:00 and 3:15, or indicated that they had returned to the worksite.

On Wednesday, August 28, Respondent's Vice President Frank Willard drove to Seneca Falls jobsite, arriving at about 2:00 p.m. He watched the crew unobserved from a parking lot and saw them leave at 2:30. Willard stayed at the Seneca Falls school until 3:00 p.m. Willard also made no inquiry as to why the crew left early nor did he indicate to any of them that he was aware of their early departure.

Varco went back to the site on Thursday, August 29, arriving about 2:20 p.m. He watched the crew from a concealed location and saw them leave the site at about 2:30. Varco reported his observations to Willard. Varco returned to the shop, and was there when Bidwell and Szuszniak arrived at 4:10. Again, Varco made no inquiries as to their whereabouts after 2:30. Bidwell and Szuszniak turned in their weekly timesheets to Varco on August 29 because neither was to be at work on Friday. They both reported that they had arrived on the jobsite at about 7:15 a.m. on Monday and about 6:45 Tuesday–Thursday. Bidwell and Szuszniak also reported that they after spending eight hours on the jobsite, they left Seneca Falls at 3:45 p.m. on Monday and 3:15 Tuesday and Thursday. Their timesheets reported 32 hours of work at the jobsite, which was to be compensated at the prevailing wage rate and six hours of driving time and a half hour of shop time, which was paid at a much lower rate than the prevailing wage.

On Friday, August 30, Bidwell attended a representation case hearing at the Federal Building in Syracuse, pursuant to a union subpoena. Christine Kaiser and Frank Willard were also present. Neither Szuszniak nor Noga worked on August 30; Vitetta worked 6 hours at the jobsite. All four crewmembers reported 8 hours of work on the jobsite for Monday, August 26 through Thursday, August 29.

Monday, September 2, was the Labor Day Holiday. The next working day, Tuesday, September 3, 2002, Christine Kaiser and Frank Willard met very briefly with Bidwell, Szuszniak and Noga. Kaiser and Willard confronted all three with the assertion that they left the jobsite considerably earlier than their timesheets indicated. All three insisted that the timesheets were materially accurate. Neither Kaiser nor Willard indicated to any of the three the basis on their assertions. Willard had a brief telephone conversation with Joseph Vitetta in which Vitetta told Willard that he was upset because he was putting his dog to sleep and that he would speak to Willard about the timesheets the next day.[5]

Later in the afternoon, Willard met again with Michael Noga, this time in the presence of Joseph Varco and "Ike" Shippers. In this second meeting, Willard informed Noga that the three

[4] Varco made notes regarding all his jobsite visits to Seneca Falls during the week of August 26-30. These notes deal almost exclusively with the early departure of the crewmembers.

[5] It is unclear whether there was any substantive discussion about the timesheets with Vitetta on September 3.

had personally observed that Noga was not at the jobsite at all times he claimed to have there. At this point, Noga conceded that the information on his timesheets could be off by 5–15 minutes but that the total number of hours he claimed to have worked was correct.[6]

On the morning of September 4, all four employees were called into Chris Kaiser's office. They were each handed a letter stating that they were being terminated for "leaving your assigned job site during your scheduled work hours last week and falsifying your time sheet for the week ending August 30, 2002." It is unclear whether Joseph Vitetta was ever given an opportunity to admit that his timesheet was not accurate or whether he was accorded an opportunity to correct it.[7]

Credibility Resolutions

None of the witness who testified regarding the circumstances surrounding the four discharges is unbiased. Moreover, Varco, possibly the key witness is this case, was one of the most ill at ease, nervous witnesses I have ever observed. He also initially testified, less than forthrightly, that nobody at Respondent told him to resign as president of the Union. He later admitted that in or about June 2002, Christine Kaiser told Varco he could either resign as president of the Union, resign his employment or be fired.[8] Varco chose to remain employed. He has remained a member of the Union but has not attended a union meeting since June 2002. I infer that Varco was very worried that he might lose his job as a result of his testimony at this hearing.

Nevertheless, I conclude that the testimony of Varco, Shippers and Willard, regarding the times at which they found crewmembers absent from the Seneca Falls jobsite, or observed them leaving the jobsite, is credible. Nothing in this record indicates that any of this testimony is fabricated. While the charging party's brief attacks Varco's credibility, it offers no reason to discredit the corroborating testimony of Shippers and Willard with regard to the crew's whereabouts on Tuesday, August 27 and Wednesday, August 28.

Moreover, there are a number of inconsistencies in the testimony of the four alleged discriminates. Bidwell's account of his September 4 conversation with Frank Willard regarding his hours the prior week is internally inconsistent. First, Bidwell testified that he told Willard that the crew left the jobsite at about 4:00 p.m. each day (Tr. 43). Then, he testified that, "Frank Willard asked me about not being on the job at a certain time. I said it could be due to us floating hours (Tr. 44)". This term refers to the practice of Respondent's crews, when working at locations several hours away from the shop. At these sites, the crews often work late Tuesday through Thursday, so they can drive to the site on Monday morning, arriving at midday and leave the jobsite early on Friday and be back to Respondent's shop by 5:00 p.m. on Friday. When "floating hours," the crews record eight hours per day of work on their timesheets even though they worked more than eight hours on Tuesday through Thursday and less Monday and

[6] Frank Willard testified that Noga admitted to "fudging" his timesheets by as much as a half an hour. Noga testified that he offered to amend his timesheets on September 4, but was not allowed to do so.

[7] Joseph Varco conceded that all four discriminatees were generally good employees. With the exception of Bidwell, who had received a written warning for alleged marijuana use in March 2001, none of the four had been disciplined by Respondent previously.

[8] Kaiser also testified that she told Varco that he could either resign as union president, be fired or resign his employment.

Friday.[9] There is no credible evidence that the Seneca Falls crew worked longer hours on some days to make up for leaving early on others. Moreover, if Bidwell and Szuszniak were leaving the jobsite each day at the times to which they testified, there was no need for them to "float hours".

John Szuszniak testified that on August 27, after Noga and Vitetta left the jobsite at about 2:30, he and Bidwell cleaned off all the lights that the crew had to hang the next day. Further, he testified that this task took about an hour and that the two finished cleaning all the lights (Tr. 180-81). This testimony, which accounts for a time period during which Varco contends the Bidwell and Szuszniak were not at the site, is inconsistent with Joseph Vitetta's testimony as to how he spent his time on Friday, August 30. Vitetta testified that he and employee Terry Burdick cleaned, dusted and then hung the lights (Tr. 135). Vitetta testified that these lights were dusty and had not been cleaned (Tr. 149).

Michael Noga's testimony varied significantly within a few minutes. Respondent's counsel asked him:

> Q. Mr. Noga, if Mr. Willard were to testify that he visited the jobsite Wednesday, August 29, and observed the crew, including yourself, departing at 2:30 p.m. would that testimony be accurate?[10]
>
> A. I don't know.
>
> Q. Do you have any reason to believe it would be inaccurate?
>
> A. No. (Tr. 202-03).

However, Noga then continued to deny that he left the jobsite early on August 28 and minutes later testified that Willard's testimony would be inaccurate if he concluded that Noga had left the jobsite prior to 3:30 and that Willard had observed the crew leaving at 2:30 (Tr. 203-05).

Finally, Joseph Vitetta conceded at trial that his timesheets for the week of August 26-30 were inaccurate (Tr. 143-44).

Analysis of the Alleged Section 8(a)(3) discharges

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB No. 177 (2002).

[9] This apparently has something to do with the requirements of the New York prevailing wage law.

[10] The correct date of Willard's visit was Wednesday, August 28.

However, when an employer discharges a group of employees to discourage employees generally from engaging in union activities, it is the discharge, not the selection of individual employees that is unlawful. Thus, the General Counsel is not required to show a correlation between each employee's union activity and his or her discharge. Instead, the General Counsel's burden is to establish that the discharge was ordered to discourage union activity or in retaliation for the protected activities of some of the employees, *Activ Industries,* 277 NLRB 356 fn. 3 (1985). As the Second Circuit noted almost forty years ago, "[a] power display in the form of a mass lay-off, where it is demonstrated that a significant motive and a desired effect were to 'discourage membership in any labor organization,' satisfies the requirements of Section 8(a)(3) to the letter even if some white sheep suffer along with the black," *Majestic Molded Products, Inc. v. NLRB,* 330 F. 2d 603 (2nd Cir. 1964).

Jeff Bidwell was the primary employee involved in the Union's organizing effort. I find that Christine Kaiser and Frank Willard were well aware of this fact. I infer that Kaiser and Willard made the connection between the statements made by Bidwell regarding the company's pension plan and the union's representation petition received on or about August 20. Moreover, Christine Kaiser testified that more than one bargaining unit member was supplying her with information about organizing campaign, including the distribution of union authorization cards. Given the relatively small size of the bargaining unit (approximately 16 employees), it can reasonably be inferred that Kaiser and Willard were aware of the identity of the leaders of the organizing campaign, and possibly all those involved in union activity, *La Gloria Oil and Gas Co., supra,* (slip opinion page 3). Finally, if there was any doubt in the minds of Kaiser and Willard about Bidwell's support for the Union, those doubts would have been dispelled by his attendance at the representation case hearing on August 30.

I also find that Kaiser and Willard were aware of John Szuszniak's support for the Union. First of all, they were both aware that Szuszniak had originally been referred to their company by the union's hiring hall. Szuszniak also attended a union meeting and passed out two union authorization cards. Since Chris Kaiser was being kept abreast of the organizing campaign and the distribution of authorization cards, I infer that she was aware of the identity of several union supporters—including Szuszniak. She may also have been aware from these sources that Joseph Vitetta and Michael Noga had attended union meetings. Moreover, even if Kaiser did not have information specifically abut Vitetta and Noga's interest in the Union, she could have easily inferred that those employees working on Bidwell's crew were likely union supporters.

Further, I conclude that Respondent harbored animus towards the employees engaged in the organizing campaign. First of all, I infer animus from Respondent's surveillance of the Seneca Falls crew, which it initiated within days of its receipt of the representation petition, and its failure to confront the employees immediately upon discovering that they were leaving the job early. These site visits were motivated by a desire to find a basis for terminating union supporters and intimidating others employees who might be inclined to support the Union. I also infer animus from the disparate treatment accorded these four employees when compared to Respondent's lenient treatment of Brian Britton several months previously. I also draw this inference in part from a letter that Christine Kaiser and Frank Willard distributed to employees. This letter accused those soliciting employees for the Union of misrepresenting the authorization cards' significance despite the fact that Respondent had no reliable knowledge that such misrepresentations were being made.[11]

[11] While Respondent's brief states that the information provided by Kaiser regarding the effect of the union authorization cards "was entirely accurate," Kaiser conceded that she had no

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Finally, I conclude that the General Counsel has established that the discharge of the four employees was motivated by Respondent's anti-union animus. Additionally, I find that Respondent has not met its burden of proving that it would have discharged the four employees absent its motive to discourage its employees from selecting the Union as their collective bargaining representative.

There are a number of factors that suggest discriminatory motivation. The timing of the discharges, two weeks after the filing a representation petition and the second working day after the NLRB representation hearing, is such a factor. Another is Respondent's efforts to find a reason to discharge union supporters. A third factor is the disparate treatment of the four alleged discriminatees as compared to Respondent's treatment of a similar offense by Brian Britton several months previously.

I regard's Respondent's leniency towards Britton to be one of the most critical factors in this case. In the spring of 2002, several months before the beginning of the organizing campaign, Britton missed work on a Friday, but then joined his crew on its return to the shop so that he could turn in his timesheet, which indicated that he had worked eight hours on that day. This was an obvious attempt to cheat Respondent out of a day's pay. On Monday, the next working day, Respondent's Vice-President Frank Willard confronted Britton and asked him where he was on Friday. Britton admitted that he had not been at work. Willard asked him why his timesheet showed that he had worked on Friday. Britton responded that he didn't have an honest answer for that question. Willard did not discipline Britton. Willard told Britton he was disappointed in him and that such behavior could not happen again. Britton assured Willard that this wouldn't happen again and amended his timesheet.

The General Counsel and Charging Party contend that the disparate treatment of the four alleged discriminatees as compared to Britton is persuasive evidence of discriminatory motive. They also suggest that while Willard immediately confronted Britton with his misconduct, Respondent let the discriminatees' misconduct continue because it was looking for a reason to rid itself of the key union supporter (Bidwell) and viewed this as an opportunity to stymie the organizing drive.

I conclude that Respondent checked up on the Seneca Falls crew from August 26-29, with the primary, and possibly the sole, objective of finding grounds for terminating them and inhibiting the Union's efforts to organize their rigging employees. An employer interested only in getting its employees to work a full day would have taken immediate remedial action on August 26. Not only would an employer normally confront employees about "stealing time" when the employer first became aware of such an offense, Respondent's failure to immediately confront

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basis for her assertions that:

"It has come to our attention that there may be a number of misrepresentations being made by some of those people who are distributing these union cards;" and

"It has been reported that employees have been asked to sign these union cards "so that they can get a meeting."

C. P. Exhibit 2, Tr. 421-430.

the Seneca Falls crew, as it confronted Britton, establishes discriminatory motivation with regard to its surveillance of the four alleged discriminatees.[12]

Respondent contends that Britton's infraction is not comparable to that of the four alleged discriminatees. It argues that Britton immediately acknowledged his misconduct, expressed remorse, amended his timesheet and assured Willard such misconduct would not recur. In contrast, the alleged discriminatees continued to claim wages for work they did not perform and gave Respondent no reason to believe they would not "steal time" in the future. This, it argues is important because Respondent's riggers most often work at remote jobsites where Respondent had little ability to monitor them.

At first blush, Britton's belated forthrightness suggests a meaningful distinction between his offense and that of the Seneca Falls crew. However, on closer examination, Britton's "remorse" and willingness to correct his timesheet fails to provide a convincing nondiscriminatory basis for treating him with a verbal warning and terminating the four alleged discriminatees. As the charging party notes in its brief, "Britton could not very well deny that he had not been at work when [his] entire crew was there and he was completely absent (page 24, n. 38)."

Britton had no choice but to confess his deliberate attempt to defraud Respondent. Had Bidwell, Szuszniak, Noga and Vitetta been informed that Varco, Shippers and Willard had been spying on them all week, they may also have recanted, expressed remorse and offered to change their timesheets.[13] More importantly, if like Britton, the four had been confronted with their misconduct on Monday, August 26, they may also have modified their behavior, not submitted false timesheets and promised not to leave work early in the future. Having been caught and chastised, the four may have been just as inclined to be honest in the future as Britton, who worked in locations far from Syracuse after he had demonstrated a capacity for blatant dishonesty. Thus, I conclude that Respondent's disparate treatment of the four discriminatees, as compared with Britton, establishes the pretextual nature of the company's explanation for the discharges.

The Section 8(a)(1) violation: posting of no solicitation signs

On June 18, 2002, signs hung on the front and rear entrances of Respondent's building read:

> No Solicitations
>
> We welcome our customers at any time the office is open.
>
> Those offering us their products and services are seen only by appointment, made in advance by phone.

[12] In this regard, Christine Kaiser testified that Willard informed her on August 26, that Varco had discovered that the crew left the job site early. She directed Willard to have Varco (and possibly Shippers) visit the site again the next day and document what he observed. She did not tell Willard to confront the employees, as he had confronted Britton, and Willard did not do so on his own volition.

[13] Noga may have offered to correct his timesheets on September 4.

Bidwell testified that these signs were posted for the first time on June 18, 2002, after he had a conversation with Project Manager Joseph Varco indicating that Frank Willard was aware of the union organizing drive. Varco and Christine Kaiser testified that the signs had been posted for several years previously.

I dismiss the alleged Section 8(a)(1) violation because I credit the testimony of Christine Kaiser and Joseph Varco and find that the "no solicitation" signs at the rear and side entrances of Respondent's facility had been posted for sometime prior to the advent of the organizing campaign. Moreover, the signs on their face do not appear to be directed at union activity. They appear to prohibit commercial solicitation without an appointment. I therefore conclude that in posting these signs Respondent was not interfering with, restraining or coercing employees in the exercise of their Section 7 right to organize.

III

Report and Recommendations on Challenged Ballots

In general, to be eligible to vote, an employee must have been employed both on the eligibility date, which in this case was December 15, 2002, and on the election date, which in this case was January 6, 2003. Discriminatory personnel actions cannot be used to make an employee eligible or ineligible to vote in a Board election. Having found that Respondent's discharge of Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga violated Section 8(a)(3) and (1) of the Act, it follows that they should properly be considered as employees at all relevant times. Accordingly, I find they were each eligible to vote in the election. I recommend the challenges be overruled and their ballots be counted.

Conclusions of Law

Respondent, Syracuse Scenery and Stage Lighting Co., Inc., violated Section 8(a)(3) and (1) of the Act on September 4, 2002, by discharging Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga because they engaged in union activity and/or to discourage all its employees from supporting the union.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Syracuse Scenery & Stage Lighting Co., Inc., Liverpool, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Alliance of Theatrical Stage Employees, Local 9, or any other union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Liverpool, New York office copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 3 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 18, 2003.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Alliance of Theatrical Stage Employees, Local 9 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeff Bidwell, John Szuszniak, Joseph Vitetta and Michael Noga whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jeff Bidwell, John Szuszniak, Joseph Vitetta and

Michael Noga, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SYRACUSE SCENERY & STAGE LIGHTING CO., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board – Albany Resident Office

Leo W. O'Brien Federal Building, Room 342

Clinton Avenue and North Pearl Street

Albany, New York 12207

(518) 431-4155, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.